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Nos. 85-954, 85-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MALCOLM BALDRIGE, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Secretary of Commerce had the statutory discretion to determine that Japan's refusal to abide by the International Whaling Commission's whaling moratoria did not diminish the effectiveness of the Whaling Convention.

2. Whether, if he had no discretion, the courts should nevertheless refuse to grant appropriate judicial relief from his statutory violation.

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is at its "lowest ebb . . . [when] incompatible with the expressed or implied will of Congress." 343 U.S. at 637 (Jackson, J., concurring). Those rough classifications are as commonsensical and as analytically useful in this instance as they were in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). It is the essence of our claim and of the holdings of both lower courts that the Secretary of Commerce acted incompatibly with the will of the Congress. Thus, the Baldrige-Murazumi arrangement does not lie in "an area where Executive discretion and authority are at their zenith" (Fed. Br. 42), but rather at the opposite end of the Jacksonian spectrum.

Dames & Moore demonstrates that the scope of executive authority is not resolved merely by invoking the mystique of foreign affairs. It is really too late to contend as petitioners do that the Executive Branch has a monopoly on constitutional responsibility in the vast external realm. Foreign relations is a divided power.

> "The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that the Congress is a coequal branch of government is the dominant fact of national politics today." Secretary of State Henry A. Kissinger, Dept. of State Bull. LXXII, 562 (1975).

Thus, although the validity of an executive agreement of the highest international importance was at stake in *Dames & Moore*, nowhere did this Court subscribe to the petitioners' arguments here that the Executive Branch's conduct was " 'largely immune from judicial inquiry or interference.' " (Fed. Br. 48, J.W.A. Br. 43, both quoting *Regan* v. *Wald*, 104 S. Ct. 3026, 3039 (1984)). Instead, this Court held that it "cannot ignore the general tenor of Congress' legislation . . . in trying to determine whether the President is acting alone or at least with the acceptance of Congress." 453 U.S. at 678. The President's actions were upheld in *Dames & Moore* only after

the Court was able to conclude on the basis of a most scrupulous review of the legislative record that the interpretation of the relevant statutes was not undermined by a "contrary indication of legislative intent," and was supported by a "history of congressional acquiescence in conduct of the sort [now] engaged in by the President." *Id.* at 678-79.

In this case, Congress has never acquiesced "in conduct of the sort engaged in" by the Secretary of Commerce here. To the contrary, the Packwood-Magnuson Amendment was consciously designed to make such a result impossible.

Federal Petitioners may think Congress erred. They strenuously contended as much at the time—and lost. Evidently they continue to hold that they should be permitted to exercise their special talents and judgment because relations with another nation are in question. This is not an unusual fancy of the Executive Branch in the perpetual struggle between Executive and Legislature over the foreign affairs power. But Congress here had the undoubted power to legislate an automatic sanction. From the Commerce Clause, from the Property Clause, even from its responsibility to punish affronts to the law of nations, its authority to determine whether foreigners might take the living resources of the 200-mile fishery conservation zone of the United States is manifest. And so too is its power to condition that privilege, as it did here, even to the point of making its loss automatic if a nation decided to ignore a worldwide whaling ban of the IWC.

If the Executive Branch wishes to insist on discretion under Packwood-Magnuson, it should carry the issue back to the Hill. For now, there is an overwhelming "contrary indication of legislative intent." Congress has spoken, as we shall now proceed to show, and under *Dames & Moore* its voice is decisive.

B. The Baldrige-Murazumi Undertaking Offends the Plain Language of the Statute

Packwood-Magnuson says that the Secretary of Commerce shall certify whaling that "diminishes the effectiveness" of the Convention. The courts below saw in this a plain and straightforward meaning. They held that a nation's knowing contravention of the IWC moratoria necessarily and by definition "diminished the effectiveness" of the IWC and the Convention.

There is hardly much room for rational argument to the contrary. The IWC is the body delegated by multinational agreement to implement the Convention's objectives. Its principal purpose is to determine the appropriate level of whaling. The IWC decided in 1982 to suspend all sperm whaling in 1984 and all whaling of any species by 1986. This was the most important action ever undertaken under the Convention. It was the supreme, culminating regulatory measure, the very capstone of the international regulatory system. Yet, the Secretary of Commerce of the United States has now endorsed Japan's continued slaughter of thousands of whales over an additional four-year period. By the stroke of a pen, he has purported to eliminate the principal sanction behind the Whaling Convention. Petitioners are hard put to suggest that this defiance of the IWC's decision by Japan, endorsed by the United States, enhances the prestige or strengthens the authority or adds to the reputation and weight of either the IWC or the Convention. It would be difficult to imagine any action which more clearly "diminishes the effectiveness" of the international system.

Nor has either set of petitioners tried very hard to justify the action in Packwood-Magnuson terms. Instead, they argue around the statutory formula. The Secretary of Commerce, they say, had unlimited discretion to decide whether another nation had affronted Congress' standard. In doing so, he may weigh any consideration whatever, even setting off the conservation of the great

whales and the integrity of the Convention process against the political need to avoid "disharmony among nations." (Fed. Br. 44-45.) This is precisely what Congress intended to avoid. To allow it is to rewrite the law.

The extent to which the Secretary would replace Congress' scheme with his own becomes clear from his stretched-out transition period for the Japanese to terminate "commercial" whaling. The fact of the matter is that the statute lays down its own precise timetable for compliance. If a nation diminishes the Convention's effectiveness, it is certified and its fishing allocation in United States waters cut "by not less than 50 percent." 16 U.S.C. § 1821(e)(2)(B) (1982). The certification initiates a 365-day "remedial period" within which the offending nation is to bring itself into compliance with IWC policy. *Id.* at (A)(ii). If it is established within that 365-day period that the reason for the certification no longer exists, the reduced allocation is reinstated. *Id.* at (C)(iii). If not, the reduction becomes permanent and the Secretary of State "may not thereafter make any allocation to that country . . . until the certification is terminated." *Id.* at (D)(ii).

In the face of this carefully crafted and clearly defined procedure, with its absolute one-year time limit, it can hardly be said that a promise to comply four years hence could suspend the requirement of Packwood-Magnuson certification. Yet the Secretary argues that he has discretion to withhold certification altogether, thus nullifying the one-year limit, in exactly the same circumstances. His ad hoc creation of a four-year "remedial period" is prohibited by the express and unambiguous words of the statute.

In short, the Secretary's action offends the statute on its face.

C. The Legislative History Confirms that the Secretary Has No Discretion To Endorse Intentional Whaling in Excess of IWC Quotas

Petitioners' position comes down to the proposition that the phrase "diminish the effectiveness" is an empty vessel, which the Secretary may fill with any meaning that he in his "informed discretion" may desire. We do not contend that the Secretary lacks the capacity to discriminate between improper nonquota whaling practices which require certification because they diminish the Convention and those that do not, but he has no discretion to ignore his mandate with respect to the baseline case of zero IWC whaling quotas. This was the culminating regulatory step. By a stroke, it made all previous measures academic. If defiance of the total ban would not diminish the effectiveness of the Convention, nothing would. The words of Congress would be drained of meaning. Petitioners' reading of the statutes offends their clear intention. An objective review of the legislative history can lead to no other conclusion.

As stated, from 1971 to 1979, five certifications occurred under the Pelly Amendment—all for the killing of whales in excess of IWC quotas. In each case the President exercised his statutory discretion to withhold economic sanctions. Congress adopted the Packwood-Magnuson Amendment to ensure that nations violating quotas under the circumstances that had triggered the previous Pelly Amendment certifications would lose their fishing privileges in United States waters. And, Congress sought and obtained from the Commerce Department during congressional hearings an explicit agreement that the statute required—mandated—certification of any country that intentionally permitted its nationals to exceed IWC whaling quotas, as we shall now demonstrate.

1. *The Pelly Amendment*

The single point emphasized throughout its legislative history is that the Pelly Amendment sanctions were cre-

ated for the express purpose of enforcing international fishing restrictions. It was intended to put teeth into international programs that lacked enforcement power of their own. By 1971, the immediate crisis was the overfishing of Atlantic salmon by nations—primarily Denmark, West Germany and Norway—that were members of the International Convention for the Northwest Atlantic Fisheries ("ICNAF"). Those nations had frustrated ICNAF attempts to control high seas salmon fishing by using the treaty's "objection" procedure similar to the opting out mechanism in the Whaling Convention. *See* 117 Cong. Rec. 34,752 (1971).[24] The House Committee Report confirms the intended purpose to provide assured enforcement of the "ICNAF ban on the taking of Atlantic Salmon now in force . . . ." H.R. Rep. No. 468, 92d Cong., 1st Sess. 8 (1971). The other quotas that Congress expressly intended to support were those governing the commercial killing of whales:

> The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proven to be a cloak for over-exploitation on a grand scale.
>
> . . . .
>
> [T]he Committee has defined the term "fish products" to include marine mammals. As I have just

---

[24] It is nonsense to argue, as Intervenor Petitioners do, that these statutes should be construed not to apply to nations that exercise objection privileges under a treaty in order to establish exemption from quotas. Such exemption claims were precisely the evil that Congress sought to end. Nor is there any merit to the argument that the statutes, as applied, would violate the Convention. No provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas. Therefore, the case is indistinguishable from *Moser* v. *United States*, 341 U.S. 41, 45 (1951).

> indicated, whales are the most notable example of an over-exploited living marine resource.

117 Cong. Rec. 34,752 (1971) (statement of Rep. Pelly).

Congress conceived that it was imposing a nondiscretionary obligation on the Secretary of Commerce to certify activity that Congress regarded as "diminishing the effectiveness" of a marine resource conservation treaty—namely, intentionally failing to comply with restrictions on harvesting. The wording of the statute is unequivocally mandatory:

> *When* the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishing conservation program, the Secretary of Commerce *shall certify* such fact to the President.

22 U.S.C. § 1978(a)(1) (1982) (emphasis added). This mandatory duty is restated repeatedly in alternative phrasings throughout the legislative history:

> Section 8(a) of the Act would provide that whenever the Secretary of Commerce determines that nationals of a foreign country are conducting fishing operations in a manner which diminishes the effectiveness of an international fishery conservation program under an agreement to which the United States is signatory, then the Secretary of Commerce *would be required* to certify this fact to the President of the United States.

117 Cong. Rec. 34,751 (1971) (statement of Rep. Dingell) (emphasis added).

> Section 8(a) provides that whenever the Secretary of Commerce determines foreign nationals are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, *he must*

> *certify* this fact to the President of the United States.

117 Cong. Reg. 47,053 (1971) (statement of Sen. Stevens) (emphasis added).

> Section 8(a) *directs the Secretary of Commerce to certify* to the President the fact that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program whenever he determines the existence of such operations.

H.R. Rep. No. 468, *supra*, at 6 (emphasis added).

Only by a linguistic miracle can the phrases "shall certify," "would be required to certify," "must certify" and "directs the Secretary of Commerce to certify" be transformed to mean that the Secretary has the discretion to elect not to certify a nation engaged in the very activity to which the statute was directed—the intentional contravention of international fishery conservation quotas.

2. *Enforcement of the Pelly Amendment*

The Secretary has long understood that, under Pelly, any diplomatic efforts must operate within, and not contrary to, the international conservation system. Upon enactment of the Pelly Amendment, the United States undertook immediate discussions with Denmark to resolve the Atlantic salmon dispute. In striking contrast to the 1984 whaling deal with Japan, the Secretary did not seek to bypass ICNAF. Instead, fully cognizant of the intent of Congress that the quota-setting authority of the international body be recognized and enforced, he agreed that the United States and Denmark should jointly propose that ICNAF adopt a four-year phase-out of high seas Atlantic salmon fishing. The four-year phase-out was adopted at a joint meeting of ICNAF in June of 1972 (A.A. at E-5, E-11).

Likewise, the 1974 certifications of Japan and the Soviet Union established the Secretary's understanding that the Pelly Amendment required certification of intentional contravention of IWC whaling quotas, even if the offending nation committed to adhere to the quotas the very next year. The factual background for the certifications is set forth in an appendix to the Secretary's certification letter:

> In the case of the minke whale, a quota of 5,000 whales was set for the Antarctic. . . . The Soviet Union and Japan voted against this quota, stated their view that the figure should be 8,000, took formal objection to the quota and announced that each would take 4,000 minke whales during the 1973-1974 season. In fact, the Soviet Union took 4,000 and Japan took 3,713. This represented an excess of 2,713, or approximately fifty percent over quota.

(J.A. 170.) However, at the annual meeting of the IWC in June 1974, both nations switched positions, voting in favor of the quotas adopted for the 1974-1975 season. (J.A. 171.) On October 3, 1974, the IWC notified all members that no nations had filed objections to the quotas adopted at the June 1974 meeting. *Circular Communication to All Contracting Governments*, October 3, 1974, 25 U.S.T. 2978 (A.A. at F).

Thus, by October 3, 1974, both Japan and the Soviet Union were bound and committed to adhere to the 1974-75 quotas. Indeed, the Secretary recommended in the certification letter that no economic sanctions be imposed because "there appears to be sufficient likelihood of compliance with future conservation programs by the U.S.S.R. and Japan." (J.A. 172.) He nonetheless recognized his statutory duty to certify the two nations for failing to comply with the IWC quotas the preceding year:

> I hereby certify under the Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978

> (1971), that the minke whale catches of the U.S.S.R. and Japan during the 1973-1974 season exceeded the International Whaling Commission (IWC) quotas for that season, *thereby diminishing the effectiveness of the conservation program of the Commission.*

Letter from Secretary of Commerce to the President (Nov. 12, 1974) (J.A. 168) (emphasis added).

Four years later, on December 14, 1978, the Secretary of Commerce reconfirmed that intentionally exceeding IWC quotas necessarily diminishes the effectiveness of the IWC, when he entered the certification of Peru, Chile and South Korea:

> By this letter, I am certifying that nationals of Peru, Chile and the Republic of Korea are conducting whaling operations in a manner and under circumstances that diminish the effectiveness of International Whaling Commission (IWC) conservation programs. This decision was based on the fact that those countries are not members of the IWC and their nationals harvest whales substantially in excess of IWC quotas established to protect whales from overharvesting.

Letter from Secretary of Commerce to the President (Dec. 14, 1978) (J.A. 177). Again, assurance of future compliance already had been obtained. The certification letter disclosed that all three countries had stated their intention to join the IWC—Peru had ratified the Convention, ratifying legislation was pending in Korea and expected to pass by the end of the month, and Chile was preparing to introduce similar legislation. (J.A. 177-78, 182-83.) Yet, again, the Secretary recognized the mandatory statutory duty to certify those nations for failing to comply with previous IWC quotas.

The grounds for certifying Chile are in stark contrast with Japan's taking of 1,200 sperm whales over a four-year period:

> [I]nformation received in the last several months leads to the conclusion that Chilean actions are diminishing the effectiveness of IWC whale conservation programs. Notwithstanding the prohibition against taking sperm whales during the 1976-1977 season in the southern hemisphere division where Chilean vessels hunt, *figures received from the Chilean government through the U.S. Embassy show a catch of 76 sperm whales by Chilean nationals in 1976-77*

Id. (J.A. 185) (emphasis added). Seventy-six whales, in other words, were enough.

3. *The Packwood-Magnuson Amendment*

In each of the five certifications in 1974 and 1978, because the President was satisfied by assurances of *immediate* compliance—*the very next year in each case*—he exercised his clear discretion under the Pelly Amendment not to impose economic sanctions on the offending nations. (J.A. 175-76, 195-96.) Packwood-Magnuson was enacted in direct response. Its purpose was to create an automatic, nondiscretionary consequence to exactly the circumstances that led to the 1974 and 1978 certifications.

In the congressional consideration of what became the Amendment, there was no hint that the Executive conceived that it would have discretion to refuse to certify quota violators. Congress was focusing on what it saw as quite another loophole—the admitted freedom of the President to impose or refuse sanctions after certification. To eliminate the Pelly escape mechanism would have been a misguided exercise indeed if that same discretion could have been brought in by the backdoor of the certification process. But Congress' intent to make the sanction automatic in core cases of quota violations was clear:

> Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishery agreements. The major weakness has been that certification does not necessarily impose

> any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty.
>
> In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification.

125 Cong. Rec. 22,083-84 (1979) (statement of Rep. Oberstar).

Petitioners aver that "[n]owhere in the legislative history is there an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas" (Fed. Br. 13). Examination of the hearings on Packwood-Magnuson reveals otherwise. Congress sought and obtained from the Department of Commerce witness agreement that certification is mandatory and nondiscretionary with respect to intentional contravention of IWC quotas. On June 4, 1979, Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, testified as follows in House of Representatives hearings:

> Mr. McCLOSKEY. . . . [A]s I read the law, and let me cite it again, which says that the Secretary of Commerce shall certify, and then that the President may invoke sanctions, it seems to me we put a duty on you to do something.
>
> . . . .
>
> Now, it seems to me the discretion then is left with the President and the Secretary of Treasury, not with the Secretary of Commerce. If you have determined, as you in your testimony indicate, that Japan is importing non-IWC whale products, I do not see where you have any discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change.
>
> It seems to me that is a State Department discretion. What is your comment on that?
>
> Mr. FRANK. I am not sure that, first, with respect to the latter discretion it is just the State De-

partment. We are involved very much in that decision, too.

Mr. McCLOSKEY. And as should be. *But the certification is a mandatory act under the law. It is not a discretionary act.*

Mr. FRANK. *That is correct.*

. . . .

Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, *if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing.* But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas, or the elimination of any imported fish products from that country and, the second part is the optional authority that the President has.

Mr. FRANK. *That is correct. The first one is mandatory on the Secretary of Commerce. The second is discretionary on the part of the President.*

. . . .

. . . The specific language is, we must find that the country is engaging in trade or taking which diminishes the effectiveness of any program for an endangered or threatened species. You need not, under this, be violating the treaty.[25]

Petitioners rely (Fed. Br. 37 & n.46) on isolated quotations out of context to argue for discretion in the Secretary. Admittedly, though his discretion under the statute is not so broad as to permit him to sacrifice whale conservation to diplomatic good will, the Secretary has the

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[25] *Whaling Policy and International Whaling Commission Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 301, 322-23 (1979) (J.A. 203-04) (hereafter cited as "*1979 Oversight Hearings*") (emphasis added).

responsibility to draw the line between those nonquota whaling practices that diminish the effectiveness of the Convention process and those that do not. But this is the most that can be made of the quotations on which Federal Petitioners rely. There was extensive interrogation of NOAA Administrator Frank during the House hearings concerning the distinction between an intentional defiance of quotas, which would require automatic certification, and violating nonbinding IWC resolutions, which the Secretary might in his discretion also certify:

> Mr. BREAUX. . . .
>
> Have we not used our authority under the Pelly amendment to get the attention of some of these countries with regard to their apparent—very serious violations of the intent and the actual law concerning the IWC provisions?
>
> Mr. FRANK. We have used the Pelly amendment most recently in connection with . . . Peru, Chile, and South Korea. They were the most flagrant violators *because they were taking whales without regard to IWC quotas*. . . .
>
> . . . .
>
> IWC resolutions are not binding. *If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply.* I think it is a more difficult question if a country is violating something that is a recommendation but not binding.

1979 Oversight Hearings 311-12 (J.A. 200-01) (emphasis added).

> Mr. McCLOSKEY. In your testimony you have found that Japan is in violation, have you not?
>
> Mr. FRANK. No sir, we have not, and the reason we have not is that there is a more subtle issue here. *They are not violating an IWC quota or an IWC prohibition.*

> Mr. McCLOSKEY. Wait a minute. Indirectly?
> Mr. FRANK. They are not indirectly violating a quota. What they are doing is acting inconsistently with a nonbinding resolution.

Id. at 323 (J.A. 204) (emphasis added).

Petitioners point to references by Representative Breaux to the Secretary's "discretion" (Fed. Br. 37-38 & n.46). Examined in context, the quotes reveal that Representative Breaux understood that "discretion" existed only with respect to activities other than the intentional contravention of whaling quotas:

> No. 1, I would take it that even if we make it mandatory there is still somewhat a degree of discretion within the certification process as to whether a country is in violation of the terms of the international agreement and that is always going to be there; and I want you to address that point; because apparently Richard Frank was talking about the problem they are having right now with countries, member countries to the IWC that are not following what they would like them to do in the sense of making data available on the count of the whales, in addition, on the countries importing of whale meat.
>
> . . . .
>
> *Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision.* Then you get into two other categories, not supplying enough data and the importation of whale meat.

1979 Oversight Hearings at 359 (remarks of Rep. Breaux) (emphasis added).

There is not one word by Representative Breaux, or by anyone else, in the legislative history of the Packwood-Magnuson Amendment that suggests certification is not mandatory with respect to the one practice to which the

Pelly and Packwood-Magnuson Amendments were particularly addressed and which under any conceivable interpretation of Congress' instruction "diminishes the effectiveness of" the IWC—the intentional contravention of IWC quotas. As Representative Bonker made clear to another Administration witness, Deputy Assistant Secretary Negroponte of the State Department, the purpose of Packwood-Magnuson was to cause the loss of fishing privileges in exactly the same circumstances as had triggered the five prior Pelly Amendment certifications:

> Mr. BONKER. The second objection you cite concerns lack of discretion or flexibility in the implementation of that amendment.
>
> Would you not agree that the reason the Packwood amendment has been advanced is because the discretion that now rests with the President has not been used effectively. In other words, the discretion is there to impose and invoke the Pelly amendment, but even under justifiable circumstances it has not been done. *So Congress is simply moving in a more specific way to mandate it.*[26]

(J.A. 218.)

4. *Congress' Rejection of Petitioners' Arguments for Executive Discretion*

Federal Petitioners urge that the Executive Branch be allowed to apply "its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW"; they entreat (Fed. Br. 44-45) that "[a] strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts." Federal

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[26] *Fishery Conservation and Management Act: Oversight Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 313, 323 (1979) (hereinafter cited as "*Fishery Conservation Oversight Hearings*") (J.A. 209, 218) (emphasis supplied).

Petitioners made the same argument to Congress in 1979. But in contrast to the interpretation now argued to this Court, the State Department claimed then that the Amendment was too iron-clad. Deputy Assistant Secretary of State Negroponte testified that the bill that became Packwood-Magnuson:

> appears to provide *little flexibility or discretion* in its implementation.
>
> . . . .
>
> [W]hat the Packwood amendment does is perhaps go a bit too far in *tying the administration's hands in its ability to deal with these problems on a diplomatic basis.*

Fishery Conservation Oversight Hearings at 313, 323 (emphasis supplied). The Commerce Department also argued: "[Packwood-Magnuson] should be modified to allow some flexibility to respond proportionately to the nature and scope of the particular offense." *Id.* at 314 (J.A. 210) (statement of Eldon V.C. Greenberg, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce). The State Department specifically proposed creating a delayed compliance period prior to sanction:

> Mr. NEGROPONTE: I think if we could decouple the certification process from the process of actually reducing allocations so that once there has been a certification, there is time then to go to Japan or any other country and say, look, this step has been taken. Do you realize if you don't do anything to remedy the situation which caused it, that next year we will be forced to reduce your allocations?

Id. at 325 (J.A. 220).

Congress not only rejected these arguments, it further revised Packwood-Magnuson after this testimony to provide for *immediate* partial suspension of fishing quotas under permits already issued rather than only a prohibition on issuing new permits after a certification. Con-

gress explicitly opted for sanctions first, negotiation later —just the opposite of the State Department proposal. To revisit the issue, the Executive Branch should address the Congress, not this Court.[27]

5. *The Similar Wording in Other Statutes*

In contrast to their near-total silence regarding both the Packwood-Magnuson hearings and the consistent history of Pelly Amendment administrative enforcement, Federal Petitioners devote considerable emphasis in their brief to their interpretation of similar language in other statutes. Respondents submit, first, that these statutes are of marginal relevance to this case. Congress in 1979 had a single, unmistakable and quite explicit intent in enacting Packwood-Magnuson—to cause the automatic revocation of fishing privileges in the quota-violation circumstances leading to the five earlier Pelly Amendment certifications.

And if the phrase "diminish the effectiveness" elsewhere sheds light on Packwood-Magnuson, the comparison confirms our position. The 1984 Eastern Pacific Tuna Licensing Act ("EPTLA"), 16 U.S.C. §§ 972-972h (Supp. II 1984), was enacted to implement the Eastern Pacific Ocean Tuna Fishing Agreement ("EPOTFA"). During

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[27] Intervenor Petitioners' argument that Packwood-Magnuson constitutes an unconstitutional delegation of legislative power to the IWC is patently frivolous. (JWA Br. 28-32.) The governing precedent is *United States* v. *Sharpnack*, 355 U.S. 286 (1958), which holds that Congress may constitutionally incorporate by reference the prohibitions and regulations adopted by other legislative bodies. Although *Sharpnack* expressly approved incorporation by reference of state law, the general principle has long been relied on by Congress to incorporate into the laws of the United States the provisions of international fisheries and wildlife conventions. *See, e.g.*, Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773, 773e (enforcing regulations adopted pursuant to Convention between the United States of America and Canada for the Preservation of the Halibut fishery of the Northern Pacific Ocean and Bering Sea, 5 U.S.T. 6 (1953)).

the late 1970's and early 1980's, the United States, in conflict with the coastal nations of Central and South America, recognized no right to restrict tuna fishing beyond the 12-mile territorial limit; nearly all of the coastal nations of Central and South America purported to regulate tuna fishing within 200 miles of shore. The result: a continuing cycle of seizures of U.S.-flag tunaboats, followed by retaliatory U.S. embargoes of tuna imports from the seizing countries. The EPOTFA was signed by the United States, Panama and Costa Rica on March 15, 1983 as a temporary resolution of that conflict.

Contrary to the Federal Petitioners' implication (Fed. Br. 39-41), it was not intended as a conservation agreement at all, but as a device to channel license fees to the Latin Americans.[28] In the words of the Senate Committee on Foreign Relations, in recommending Senate ratification of EPOTFA, "[t]he primary purpose of this agreement is to provide an international licensing arrangement for tuna fishing in a broad area of the eastern Pacific Ocean." S. Exec. Rep. 13, 98th Cong., 1st Sess. 1 (1983). The Agreement contemplated that all Eastern Pacific tuna fishing vessels must have a license from the EPOTFA Council. To obtain a license, each vessel would pay an annual fee based on its net registered tonnage. The aggregate fee amount was to be distributed at the end of each year to the Contracting Parties in proportion to the amount of tuna taken within 200 nautical miles of their coasts that year.

The EPTLA, enacted to implement EPOTFA, provides for compensation to American tunaboats seized for violation of EPOTFA, but only in the event that the Secre-

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[28] By its terms, the Agreement did not permit the EPOTFA Council to make even interim conservation recommendations concerning tuna resources until "the Contracting Parties include all States that harvest tuna in the eastern Pacific Ocean on a meaningful scale" in relation to conservation requirements. EPOTFA, art. III, para. (D); S. Exec. Rep. 13, 98th Cong., 1st Sess. 4 (1983).

tary of State determines that the violation which lead to the seizure "is not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. § 972c. Since the "primary purpose" of the Agreement was licensing, Congress made clear that failure of a vessel to obtain a license would necessarily diminish the effectiveness of the Agreement and therefore bar compensation:

> *It is the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the EPOTFA*, the seriousness of a violation of a conservation regulation would need to be determined by the Secretary.

Eastern Pacific Ocean Tuna Fishing Agreement, H.R. Rep. No. 721, 98th Cong., 2d Sess. 5 (1984) (emphasis added). This is precisely the distinction that Congress drew in Packwood-Magnuson in 1979, between the taking of whales in violation of IWC quotas "that automatically would require" certification, and lesser offenses that could invoke the Secretary's judgment whether the Convention was diminished.

The 1962 amendments to the Tuna Conventions Act also support Respondents' position and the interpretation of the courts below. Those amendments, 16 U.S.C. § 951 *et seq.*, instruct the Secretary of Commerce to promulgate regulations prohibiting tuna imports from countries whose nationals conduct fishing operations "in such a manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations" proposed by the Inter-American Tropical Tuna Commission. 16 U.S.C. § 955(c) (1982). Federal Petitioners misleadingly suggest (Fed. Br. 23-24 & n.25) that regulations implementing *that standard* involve discretion. They are wrong.

The Tuna Convention Act Amendments create two separate standards, violations of which result in two different levels of tuna embargo. If a country's tuna vessels

are being used for fishing operations that "would tend to diminish the effectiveness of the conservation recommendations of the Commission" the Secretary of Commerce is required to prohibit the import from that country of fish of that species taken from the regulatory area. In the case of "repeated and flagrant fishing operations" that "seriously threaten the achievement of the objectives of the commission's recommendations," however, the Secretary is granted the *discretion* also to embargo other species of tuna. 16 U.S.C. § 955(c). The "frequent and flagrant" standard is not, as Federal Petitioners imply (Fed. Br. 22-24), identical to the "diminish the effectiveness" standard, and it alone imparts discretion.

Furthermore, the Executive Branch understood that violation of the Tuna Commission's conservation recommendations would necessarily "diminish the effectiveness" of the Commission and lead to an automatic embargo. As of 1962, enforcement of the Tuna Convention Act was the responsibility of the Department of Interior. Congress enacted the 1962 Amendments in express reliance on Department of the Interior assurances that the "diminish the effectiveness" standard would require an embargo of tuna from any country that failed to carry out the Tuna Commission conservation recommendations:

> Because the [Senate Commerce] committee regards these provisions as being of key importance, it is including the Department's statement at this point in the report so that the intended operation of the provisions may be clear. The statement follows:
>
> > ". . . To implement these requirements in the legislation, the Department would consider the species of tuna subject to conservation regulations *ineligible for entry when any of the following conditions obtains in the country from which it is offered for entry*:
> >
> > . . . .
> >
> > "2. The country does not put into effect conservation measures applicable to its own fisher-

> men adequate for the implementation of the Commission's recommendtions."

Conservation of Tropical Tuna, S. Rep. No. 1737, 87th Cong., 2d Sess. 6-7 (1962) (emphasis added).[29] Thus, the court of appeals was absolutely correct in interpreting the 1962 Amendments to the Tuna Conventions Act as requiring that "[i]f a foreign country failed to implement the harvest recommendations, that failure would automatically result [in] imposition of the statutory sanctions on the foreign country." Pet. App. 28a.

Implementation of the 1962 Amendments, which petitioners pointedly fail to discuss, confirms the mandatory nature of an embargo when harvest recommendations are violated. In 1975 the Department of Commerce undertook an investigation of yellowfin tuna fishing in the

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[29] The quotation from this same document that is set forth at page 23 of Federal Petitioners' Brief is taken out of context from a discussion of the Department's intended method of proceeding with respect to nations that have already committed to carrying out the Commission's conservation regulations. With respect to those nations that failed to provide such a commitment at the outset the Department assured Congress it would impose an absolute bar on entry of any tuna that could not be *proved* not to have been taken in contravention of the Commission's recommendations:

> [W]e would plan to issue regulations which would require in effect that all tuna of the species covered by the conservation regulations offered for entry into the United States from countries from which we had not received adequate assurances be accompanied by documents. These documents would give such particulars as would demonstrate that the tuna were not ineligible for entry, i.e., proof that if caught by nationals of the exporting country, the tuna were not taken in the regulatory area or that adequate conservation measures were being carried out, and proof that, if caught by nationals of a third party, the tuna were not taken contrary to the recommendations of the Commission.

Conservation of Tropical Tuna, S. Rep. No. 1737, 87th Cong., 2d Sess. 7-8 (1962) (Statement of the Department of the Interior).

Eastern Tropical Pacific Ocean by nationals of several countries after the season had been closed. With respect to most, there was insufficient evidence of violations to support an embargo. Spain, however, was found to have taken approximately 2,500 tons of yellowfin tuna (1.43% above the ceiling of 175,000) out of season. Notice of Embargo, 40 Fed. Reg. 48,159 (1975). This closed-season fishing was found not to be so "frequent and flagrant" as to call for an embargo on all species of tuna from Spain. Notice of Intent and Finding, 40 Fed. Reg. 42,229 (1975). But because the intentional noncompliance necessarily "diminished the effectiveness" of the conservation recommendations, the Commerce Department banned imports from Spain of yellowfin tuna. 40 Fed. Reg. at 48,160. Such was the history of administrative implementation of the Tuna Conventions Act Amendments before the Congress when it considered the Packwood-Magnuson Amendment in 1979.

Finally, Federal Petitioners' reliance (Fed. Br. 30-33) on the "endangered wildlife" amendment to the Pelly Amendment in 1978 is misplaced. It is not an analogue of Packwood-Magnuson. The 1978 amendment was intended to support the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). Congress was well aware that CITES was different from ICRW and lacked any quota-setting mechanism:

> The primary function of [CITES] is to regulate international trade in the species it protects. Its rules, however, apply only to import, export and re-export. *The Convention does not apply * * * to the taking of species*, or to the preservation of habitat.

H.R. Rep. No. 1029, 95th Cong., 2d Sess. 10 (1978) (emphasis added). Accordingly, CITES sheds no light on the interpretation of a statute whose central purpose is to encourage and enforce quota limits.

D. Until Now, the Executive Has Consistently Held that Certification of Intentional Contravention of Fishing Quotas Was Mandatory

Executive Branch practice since 1971 has been consistent; certification has followed quota violation automatically. The practice itself—the enforcement history of the Pelly Amendment from 1971 through 1979— is discussed at pages 21-24 above. But there is more to the story. The Executive vigorously captured the essence of the issue in the context of litigation in 1977 when it represented to the courts that any acquiescence by the United States in a failure to comply with a quota decision would devastate the IWC.

When the IWC established a zero quota for the taking of bowhead whales in 1978 by Alaskan Natives and the United States decided not to object to that decision, the Alaskans sued the Secretary of State to compel him to file an objection. *See Adams* v. *Vance*, 570 F.2d 950, 952 (D.C. Cir. 1978). A U.S. objection would have allowed the taking of only 15-20 whales in the single year of 1978. Yet, the Government contended that the objection, even if later withdrawn, would be a disaster for the international regulatory effort. The Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs testified by affidavit that "A United States objection at this time *would seriously weaken the effectiveness of the International Whaling Commission* as an instrument of conservation." Mink affidavit, ¶¶ 7, 8. (J.A. 138-39) (emphasis added). The United States Commissioner to the IWC in 1977 stated to the Court:

> It seems likely that a United States objection now would:
>
> . . . .
>
> Result in a return at IWC to the approaches of the previous decades, an approach which all agree has brought the virtual demise of the great baleen whales of the Southern Ocean. At worst a United

> States objection could result in the breakdown of IWC. In either case objection at this time would result in the threatened destruction of many whales, endangering the very existence of some species.

Aron affidavit, pp. 9-10 (J.A. 153-54). Lee M. Talbot, senior scientist of the President's Council on Environmental Quality, concluded that the refusal of the United States to abide by the IWC decision would bring "the almost certain collapse of the IWC as an effective mechanism for whale conservation." Statement of Lee M. Talbot (J.A. 158). There is no room to argue that U.S. acquiescence in *four* years of unauthorized whaling by Japan will have any less adverse effect on the authority and prestige of the IWC.

Less than four months before the Baldrige-Murazumi arrangement, the Secretary of Commerce personally confirmed his agreement that violators of the moratorium would lose their U.S. fishing privileges. On June 28, 1984, Senator Packwood wrote to the Secretary as follows:

> It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which continues commercial whaling after the IWC moratorium takes effect would definitely be certified. *I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.*
>
> What I am asking, Mac, is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson.

Letter from Sen. Packwood to Secretary of Commerce (June 28, 1984) (emphasis added) (J.A. 197). The Secretary's July 24, 1984 response stated total, unequivocal agreement:

> You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. *I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC.*

Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984) (emphasis added) (J.A. 198).

The Secretary's commitment on November 13, 1984, not to certify Japan for commercial whaling in violation of the IWC moratoria—whaling that "would clearly diminish the effectiveness of the IWC" in the Secretary's words—cannot be reconciled with the statutory language, with the legislative history, or with 13 years of consistent administrative interpretation.

II. THE COURT OF APPEALS PROPERLY REFUSED TO DISTURB THE EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT

Petitioners also argue that, even if Congress imposed on the Secretary a nondiscretionary duty to certify Japan (Fed. Br. 46-47; J.W.A. Br. 42-49), the judiciary ought not to order the Executive Branch to follow the law. The gravamen of petitioners' arguments is that an international executive agreement has been struck and that should end the matter.[30] As a matter of general jurisprudence, however, the ultimate equity is that Congress intended mandatory certification under Packwood-Magnuson and consequent loss of fishing privileges for violation. As this Court stated in *Virginian Railway Co.* v. *System*

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[30] The major cases cited by petitioners (Fed. Br. 48; J.W.A. Br. 45-47) are inapposite. *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955), for example, found equitable relief inappropriate because it was sought "prior to any decision . . . by the Board." *See also Sampson* v. *Murray*, 415 U.S. 61, 63 (1974) (equitable relief inappropriate prior to exhaustion of administrative appeals); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (equitable relief inappropriate in light of an adequate remedy at law).

Federation No. 40, 300 U.S. 515, 551-53 (1937), "the judgment of Congress * * * is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." [31]

Federal Petitioners' more pointed argument that mandamus should have been withheld because the Secretary has undertaken a "solemn agreement between nations" (Fed. Br. at 49) is ominously circular.[32] If that is the law, the Executive Branch could bootstrap itself free of any congressional restraint merely by making an international promise.[33]

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[31] *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975) (equitable discretion must be informed by the purposes of the statute at issue); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) (equitable discretion "must be exercised in light of the large objectives of the Act").

It is nonsense to argue, as Intervenor Petitioners do, that mandamus is inequitable because it punishes Japanese nationals (J.W.A. Br. 48-49). The district court's order imposes no punishment. It merely requires the Secretary to withdraw the privilege of fishing in U.S. waters. Japan will be in no worse position than if the Baldrige-Murazumi arrangement had never existed. It can avoid any impact simply by terminating its commercial whaling. *See* 16 U.S.C. § 1821(e)(2)(C)(ii). Indeed, because of the litigation delay, the Baldrige commitment will have allowed Japanese whalers to take endangered sperm whales for two seasons without certification.

[32] The argument finds no support in the cases cited by Federal Petitioners (Fed. Br. 50); *Weinberger* v. *Rossi*, 456 U.S. 25 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). To the contrary, *Weinberger* v. *Rossi* confirms that executive agreements may not conflict with affirmative expressions of congressional intent found in the legislative history of the relevant statutes, 456 U.S. at 32. So too, *McCullough* refused to extend the National Labor Relations Act to crews working foreign-flag ships because the Court could not find congressional intent to do so in the legislative history of the Act. 372 U.S. at 19-21. *McCulloch* expressly added that its result did not imply "any * * * limitation of the power of Congress" in the field. *Id.* at 22 (quoting *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953)).

[33] Judge Oberdorfer also delicately alluded to justiciability. (Pet. A. 50a-51a). The claim here is not, however, that the courts should

Federal Petitioners are on particularly weak footing to argue (Fed. Br. 47 & n.58) that, even if Packwood-Magnuson requires certification, they owe respondents no "duty" under 28 U.S.C. § 1361 to obey the law. Mandamus has long been available to "any person" who sustains injury when an Executive Officer refuses to perform a nondiscretionary duty. *Garfield* v. *Goldsby*, 211 U.S. 249, 261 (1908) (quoting *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1875).[34] And no case holds that the type of injury required to invoke mandamus differs from the type of injury required to provide standing to sue in the first place. Respondents, whose domestic and worldwide activities concerning whales and whaling (Amended Complaint ¶¶ 3-15) readily distinguishes them from persons merely "interested" in whales (Fed. Br. 47, n.58), plainly meet this Court's requirements for standing. *See, e.g., Duke Power Co.* v. *Carolina Envt'l Study*

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review a foreign affairs decision within the sound discretion of the Executive; it is rather whether the Secretary breached the limits of the statutory authority which Congress gave him. If we are right that the duty to certify was mandatory then there is no doubt that the matter is justiciable for who is to make the determination of what the law means if not the courts? *See Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

[34] *Heckler* v. *Ringer*, 466 U.S. 602 (1984), cited by Federal Petitioners (Fed. Br. 47) is not to the contrary. That decision merely holds that mandamus will not lie when litigants have an adequate remedy at law under the administrative appeals procedures in 42 U.S.C. § 405(g), (h). So too, Federal Petitioners' reliance (Fed. Br. 47 n.58) on *Federal Election Comm'n* v. *National Conservative Political Action Committee*, 105 S. Ct. 1459 (1985), is misplaced. This decision, which does not involve mandamus, merely holds that litigants enjoy no private right of action under the Federal Election Campaign Act in light of the Federal Election Commission's "exclusive jurisdiction with respect to civil enforcement" in 2 U.S.C. § 437c(b)(1). Significantly, the Court held that the private litigants could sue the FEC "to implement or construe the Act." 105 S. Ct. at 1464.

Group Inc., 438 U.S. 59, 80-81 (1978); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 684-88 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-32 (1972).[35]

Contrary to the assertion of Federal Petitioners (Fed. Br. 50), the use of mandamus to ensure Executive Branch compliance with Congress' commands hardly depends on "finespun judicial definitions of 'mandatory and nondiscretionary' duties." A duty is no less mandatory simply because a statute's legislative history must be consulted. As this Court has long established, the existence of a duty enforceable by mandamus may be ascertained by an examination of previous legislation, the "mischief [the statute] was intended to correct and its legislative history," *Work* v. *United States ex rel. Lynn*, 266 U.S. 161, 167 (1924); *See Work* v. *United States ex rel. Rives*, 267 U.S. 175, 178 (1925); *Roberts* v. *United States*, 176 U.S. 221, 231 (1900).[36]

Finally, Federal Petitioners' fear that mandamus under Packwood-Magnuson would open the door to mandamus across the spectrum of foreign affairs is as hyper-

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[35] Even apart from the mandamus statute itself, a mandatory injunction to compel the Secretary's obedience to nondiscretionary duty is authorized in this case under two sections of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 703 (writs of mandatory injunction); § 706 (order to compel agency action unlawfully withheld). Respondents brought this case seeking relief under the APA, as well as seeking a writ of mandamus under 28 U.S.C. § 1361. To this date, petitioners have not challenged, as they cannot, respondents' standing under 28 U.S.C. § 1331 to seek the relief afforded under the APA. *See, e.g., Duke Power Co.* v. *Carolina Envt'l Study Group*, 438 U.S. 59, 81 (1978); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

[36] *See also* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 337 (1967).

bolic as it is mistaken.[37] Packwood-Magnuson speaks in its own special terms. It is a declaration by Congress that the privilege granted to foreign nations to fish in U.S. waters is to be revoked in the case of a nation which violates IWC whaling quotas. The implementation of this clear legislative command would scarcely constitute an open-ended invitation to judicial intervention in truly discretionary foreign affairs functions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[37] The only example given by petitioners (Fed. Br. 50 n.61) involves the phrase "gross violations of internationally recognized human rights" in 22 U.S.C. 2151n. Yet the legislative history of this provision states clearly that "[t]he language does not seek to define what the U.S. Congress believes is acceptable practice by other governments in their internal affairs." S. Rep. No. 406, 94th Cong., 1st Sess. 36 (1975).